CORPORATE TRUSTS.

"CORPORATE trusts" to-day constitute one of the most interesting subjects of study for both bench and bar. The statute books are filled with legislation concerning them. The volumes of reports are filled with cases arising out of that legislation. Courts and counsel are busily at work in the attempt to solve the questions presented by what are termed "corporate trusts."

But what are they?

Many attempts have been made to give a definition of the term "corporate trust." It may seem almost a matter of presumption, to make another such attempt. Nevertheless the writer will lay himself open to the charge of rashness and over-confidence, by venturing on another of those attempts.

In its last analysis, it is submitted, that the term "corporate trust" involves no new fact, and no new legal idea. The "corporate trust" will be found, on careful consideration, to have no new feature, other than that of increased magnitude. It is nothing more than an aggregation of capital in the hands of a corporation, for ordinary business purposes, in order to compete with its competitors, to make money, by producing, buying and selling at the lowest price. Single individuals have for many centuries been business competitors. Business corporations, now for nearly a century, have been business competitors. Individuals and corporations, both alike, have used precisely the same methods, fair and unfair, honest and dishonest, lawful and unlawful. Both of them have for a long time, in the heat of competition, made numerous efforts to destroy their competitors. Long ago the common law made its decisions, as to what ones of such efforts should be deemed lawful, and what unlawful. The distinction between acts that were lawful and acts that were unlawful, from an early period, practically settled down to an application of the old maxim "*sic utere tuo ut alienum non lædas.*" In other words, every man, and every corporation, had the full right, from either the civil

or criminal standpoint, to make any use whatever of his own property, provided he was guilty of no interference with the corresponding right of other men to make the same use of their property.

Until recently, the courts found no great difficulty in solving all questions as to competition, and as to combinations, whether by laborers or capitalists, in restraint of trade or for other purposes. The law was well established, beyond reasonable controversy, that combinations, between any number of individuals, or between any number of corporations, were lawful, or rather, they were not unlawful, so long as they resulted in no overt act, which constituted a violation of some legal right, of some party other than the parties combining. No matter what might be the ultimate intent of a combination, mere intent had never been held to be a violation of law. Intent, when it resulted in an act, did often determine the legal quality of that act. But intent alone, without action, was not held to constitute a violation of law, civil or criminal. It was necessary, that there should be, in addition, an actual injury, an actual interference with some legal right of another. This was the well-established law; so well established, that it is unnecessary to cite authorities to the proposition.

But legislatures and courts, in these latter days, have thrown this principle and rule of law to the winds. They have done so in view of the danger, which, in their belief, has arisen from the large modern masses of capital, which in these last years have come under single separate corporate control.

The figures are, indeed, fitted to cause wonder. The capitalizations of some of our modern industrial corporations are beyond all comparison with anything in the business world of former periods. It is evident, too, that large combinations of capital, for the purpose of controlling manufacture and markets, are to-day more numerous than they have ever been before.

But is there really any essentially new feature in the situation which arises from these large modern combinations? Have they really made any essential change in industrial methods, or industrial conditions? Have they really brought into our modern business world any new

dangers? To go one step further, if there are any new dangers, what is the wisest policy by which we are to meet those dangers?

The answers to these questions will involve some consideration of economic conditions.

Dread of the control of markets, by the use of large amounts of capital, is no new thing. The possibility of being compelled to pay exorbitant prices for articles of daily use, especially for food products, is one which has existed for centuries. The fear has always been that the prices of many articles of merchandise, and especially of food products, would rise to such a point as to cause want, and possibly starvation, among large portions of the population.

But no serious rise in prices has ever come from that cause. History shows that, notwithstanding the fact that producers and speculators have made innumerable attempts to raise the prices of all kinds of merchandise, every rise in prices which has ever been accomplished by those men has been very limited, in both locality and time. It has never done any serious injury. The reason is, that success in any such venture is made a practical impossibility by the unvarying laws of commerce. Such ventures invariably defeat their own purpose. The first attempt to raise prices results in a curtailment of purchases. Purchasers wait for prices to go down. They use other things. They go without. If speculators put up the price of wheat, people eat potatoes, or corn, or rice, or any one of the numberless other food products. If speculators put up the price of wool, people use cotton, or wait till wool goes down again. Meantime the interest account is always running, and that fact soon brings the speculators to their bearings. The "cornering," as it is termed, of any product involves the purchase of practically the entire marketable supply of that product. That involves, especially to-day, the use of large amounts of money. Almost invariably it compels large borrowings. In either way it involves the loss of large amounts in the way of interest. The object of these ventures is, of course, the profit to be made on sales. But sales cannot be made, except at prices which purchasers are willing to pay. It takes two to make a bargain. So that it has invariably

been the case that these speculative efforts to put up prices have quickly come to an end. They have seldom done any considerable harm. As a rule, the only persons who are seriously injured are the speculators. They are entitled to small sympathy. They are, almost invariably, the only sufferers.

But it is thought by many men, that some new feature is introduced into the situation to-day, by the creation of these large modern corporations, which own and control these large modern combinations of capital. We have invented a new name for these combinations. We call them "trusts." The new name has given rise to a new terror.

But is there really any feature in the problem which is essentially new?

A satisfactory answer to this question requires a statement of some of the facts as to recent industrial development.

The extensive use of the corporation, in the industrial and financial world, can hardly be said to go further back than the earlier part of the nineteenth century. Prior to that time the world's industries and its commercial operations were conducted on a smaller scale. Corporations had been formed and used mainly for political and charitable purposes. Towns, cities and states, were different forms of municipal corporations. Church institutions, colleges, schools, and hospitals were generally owned and conducted by charitable corporations. But with the increased use of machinery, which began in the early part of the nineteenth century, the amounts of capital required for manufacturing and other business purposes led gradually to a great increase in the use of corporations. This increase became continually greater with the growth of scientific knowledge, and the consequent increase in the power of man over the material forces of Nature, especially with the modern development of the new forces of steam and electricity, and the consequent increase in the use of coal and iron, for the purposes of manufacture and transportation. When each separate farmer's family made its own wool into cloth and clothing, when mankind generally used only hand tools, before they began to use what we term machinery, there was compara-

tively slight need of our modern large combinations of capital. But with the continued increase in man's knowledge of the great forces of Nature, with the continued development of new manufacturing processes, and the consequent enlargement of the masses of men, money, and material, required in the organization and operation of our great modern industries and systems of transportation, it is easily seen that the corporation became an indispensable necessity in the modern industrial world. Our immense modern combinations of men, material, and capital, without the use of corporations, are an impossibility. Without these great industrial, transportational, and financial corporations, the modern industrial world must come to a standstill, and modern civilization could not exist. Without these great corporations, with their great masses of capital, it is a practical impossibility to construct and operate our large railroad systems, or our large manufacturing plants, without which we must revert to the petty processes, and the petty methods of the middle ages. Men revile corporations, and resort to every possible method to annoy them, and impede their transaction of business. But they do so without due study and thought. Corporations are an absolute necessity to our modern industrial world. Every one of these great instruments, whatever be the wishes of its controllers, is compelled to be the servant of society. The larger the mass of capital, the more complete is the financial necessity, which compels its owners to keep it in constant operation, and to sell its products at prices which purchasers are willing to pay. The owners of these large masses of invested capital cannot afford to allow the capital to lie idle. It must be earning dividends. It can do so only by making large sales of its product. Experience shows that there is only one way to do this, and that is by giving low prices. Consequently the universal experience is, that whatever be the original purpose of the magnates who form these large combinations of capital, the invariable result is, in time—and in no long time—to put down prices. The reason is, that the lowering of prices always increases profits. So it happens, in a way that seems almost mysterious, that although the purpose of the men who form the large modern "corporate trusts" is invariably the suppression of competition, with a

large resulting profit to themselves, they always in the end secure that profit by conferring a benefit on the community at large in the shape of lower prices.

It may be said, that the creation of these large masses of capital involves a pernicious result in the suppression of small competing individuals.

That result may be conceded. Success in cheapening production, resulting in a consequent lowering of prices, whether by corporations or individuals, always results for the time in loss to competitors. That is the law of industry. Shall we therefore put an end to the lowering of prices, which must almost always come, as all experience shows, only from the processes of consolidation and concentration?

To this question there can be but one reasonable answer. Consolidation and concentration must go on. The single individual who is undersold, must betake himself to some other employment—either as a subordinate in his former line of work, or in any capacity he sees fit in some new line. Even he is not injured permanently. But even if he were, we must have industrial progress. The single individual must change his methods. There is in late years too much sentimentality over the individual. As matter of fact, the individuals who fail at one calling betake themselves to some other. In one way or another, those of them who are honest and industrious, in the long run, get a living.

The conclusion then is, at this point of our study, that these large aggregations of capital, which to-day we term "corporate trusts," are an absolute necessity in our modern industrial world; that they result, in the end, in large benefits to the community; that the evils incident to their creation are the necessary results of competition in any form, whether between corporations or individuals; that the only new feature in these new aggregations of capital is their magnitude; and that, consequently, they introduce in the industrial and legal world no new feature in kind, but merely in degree.

Consequently, there would seem to be no new legal problems. The old, well-established principles, and the old, well-established rules, would seem to be quite adequate to the situation.

But, it may be said, corporations have their advantages, but they have, on the other hand, their disadvantages. It may be said, these vast combinations of capital put too much power in single hands. The power may be used for evil, as well as for good. The concentration under single control of these large aggregations of capital is therefore a circumstance full of peril.

What is there in this position?

No doubt, the greater the power, the more serious may be the consequences of its abuse.

But what are the real disadvantages, and the real dangers? Have we here anything really new, or any really serious danger?

In considering this point, men generally lose sight of the fact, that these large combinations of capital exist in many different departments; that the increase in the amounts of capital has taken place in enterprises of all kinds; that all these different combinations of capital have a diversity of interest; and that the amounts of capital in different directions, and in different industries, have increased in the same proportion. No doubt, if all the capital in the world, or in a single country, were under a separate single control, or if all the different combinations of capital had a unity of interest, then the situation would be different, and would be one which might reasonably excite apprehension. But these different combinations of capital are not under single control. They have a complete diversity of interest; and are continually in a position of antagonism.

In short, there is no essential change in the industrial or legal situation, resulting from these large masses of capital, except one which goes through all industrial and financial interests alike. Modern civilization, and modern industries, throughout, are on a larger scale. The increase in masses of capital has been universal. One industry has grown as much as others; and the diversity of interests remains as it was. Combinations of capital have grown in all directions. But so, too, have combinations of labor. The increase of power has been the same everywhere. There has been nothing but a universal increase in volume, in every department of human industry.

To take the situation from a slightly different standpoint:

The dangers from these large combinations of capital look in two directions; if they threaten any one, they threaten two classes of persons, purchasers, and employees.

Now it is a singular fact, that the history of the modern industrial and financial world shows, on the one hand, that there has been a steady decrease in the profits of capital, accompanied by a steady decrease in the prices of manufactured products; while on the other hand, we find a steady increase in the wages of labor. And then, to supplement these facts, we have the other one, already mentioned, of the absence of a single instance where either capitalists or speculators have ever been able to make any considerable advance in prices, for any considerable time.

Really, when we consider the fact that men in the English world, according to the record, have been dreading this rise in prices, and the evil results to purchasers and employees, now for upwards of six centuries, ought not the dire spectre to have materialized by this time, if it is ever to do so?

The spectre never will materialize. The danger is not a serious danger. No doubt, there will be many individual instances, where a reduction of wages by employers, or a temporary advance in price, by a producer or a speculator, may cause temporary inconvenience to a small number of individuals. But such temporary inconveniences are not to be considered by the economist, or the jurist. The employee has his protection in his right to seek other employment. The purchaser has his protection in his right to refuse to purchase, unless at a price which commands his assent. Any such temporary inconveniences to either employees or purchasers, which are caused by the employers or producers, are not considerations which give the right to the legislator, or the judge, to interfere with the complete freedom of contract allowed by law—provided the capitalist refrains from unlawful interference with freedom of contract and freedom of action on the part of others.

That brings us to the real point of this whole discussion. What is unlawful interference with the rights of others? Every business man, every business corporation, transacts business with the purpose, with the lawful purpose, of competing with his rivals, of cutting down his own prices, and

getting his business advantages at the expense of other competitors. And, so long as he does this by honest and lawful means, he violates no law. That is the order of Nature. In order to secure the highest activity of man, and the highest development of man, it has been found necessary, with advancing civilization, that every man should own, and enjoy, the proceeds of his own labor; in other words, that he should have property. It has also been found necessary, by experience, that the owner of property should have its absolute control; that he should have complete freedom of action, as to its use and sale, so long as he does not infringe on the same freedom of action on the part of others. Healthy individual industrial activity can be secured, only by giving the fullest protection to property; which means, the giving to the owner of property the most complete freedom, in its use and sale, so long as he does not encroach on the same rights of others.

Here we come to some of the fundamental principles of the law.

It is of the very essence of property, that its owner should have utter and absolute freedom of sale; he must have the absolute power of deciding, whether he will sell it at all, and of fixing its price, in case he decides to make a sale. In other words, the *jus disponendi* is one of the essentials, in the idea of property, under any system of law, that deserves to be called civilized. The right of taxation is one thing. Under the right of taxation, whenever the State needs money, that money can be raised by taxation, even if it takes the citizen's last dollar. The right of eminent domain is another thing. Under that right, whenever the community requires any specific piece of property of a private owner, for public use, it can make a forced purchase of that property, and is not compelled to accept the price fixed by the owner. But whenever a private individual wishes the property of another owner, he must pay the price fixed by that owner. Neither any would-be purchaser, nor the State, has the right to interfere, directly or indirectly, in the most remote degree, with the right of every owner of property, in his dealings with other private individuals, to fix his own selling price, and to decide whether he will make a sale at any price. Absolute

freedom of contract, in all private employments, with all private individuals, is the first essential of property.

These positions are perfectly well established under our law. But it is these fundamental essentials in the law of property, that are questioned, and completely ignored, in many recent statutes passed by our legislatures and in many recent decisions of our courts. These statutes and decisions, it will be found, really rest on the assumption that private individuals, or that collection of private individuals which we term the public, has some kind of a legal right to compel the owner of breadstuffs, or fuel, or clothing, to sell them to other private individuals at what are termed "reasonable prices."

There is no such right. The owner of food and fuel has the absolute unlimited right, precisely as in the case of property of other kinds, to sell at his own price, or not at all, on his own free will. A man owns his wheat or his coal precisely as he owns his other property, because he has earned it and paid for it, or because his father has bought it and paid for it. If any other man wishes it, he in his turn must buy it and pay for it. The State can take it for public use, and, in so taking, it can compel the owner to make a sale at a price that is reasonable. But no such right exists in favor of any private individual, or of any collection of private individuals, to be enforced by proceedings in their own name or in the name of the State, civil or criminal, directly or indirectly. In other words, in case of a sale of private property, of land, labor, or what is commonly called personal property, by one private individual to another, each party to the transaction, vendor and purchaser, is entitled to his free equal voice in fixing the price; and no governmental power has the lawful right to interfere, directly or indirectly, with that freedom.

Men talk of the obligation of the seller to sell at "reasonable" prices. But how has the buyer any rights superior to those of the seller? If the State is to protect buyers against high prices, it must also protect sellers against low prices. The one has the same rights with the other. It is easy to see that the contention, that the buyer has any right to special State protection, must concede the same right to the seller, and must result in the affirmance of a right in the

State to interfere in any and every contract of sale, at least of what are termed staple articles of daily use, for the purpose of fixing prices. No such doctrine can be maintained. Property in wheat and coal is as sacred as property in labor. The law, rightly declared, knows no distinction between them.

It may be conceded that the principles here stated are, in their fullness, of comparatively recent origin. The right of the Legislature to regulate prices on sales by private individuals to private individuals, of property and labor alike, was in former times assumed and asserted, both in England and in this country. And the denial of the right has been a thing of comparatively recent origin. Statutes regulating the prices of labor, of wheat, wool, coal, and merchandise of all kinds, abound in the British Statutes at Large. Legislation as to prices in very singular forms is to be found in the legislative records of several of the colonies during the Revolutionary War.

But so far as my reading goes, no legislation can be found on the statute books of the different States since the Revolutionary War, which asserts directly the right of the State to fix prices on private sales of private property. The right of the State is still asserted, and maintained by the highest judicial authority, to fix and regulate prices in what are termed "public employments," employments "affected by a public use," such as the operation of railroads and other public highways, the supply of gas and water, the transportation of information by telegraph and telephone companies, and of passengers and merchandise by common carriers, the operation of grain elevators, public slaughter-houses, mills and others which need not be specifically mentioned (*Munn* v. *Illinois*, 94 U. S., 113, and other cases). But in what are termed "private employments," employments not "affected with a public use," the right of the State to interfere with prices, directly or indirectly, does not exist. In all private employments the right of the seller to fix his own price is absolute and unlimited. Buyers have no other or greater rights than sellers.

From this position, that every seller in a "private employment" has the right to fix the price at which he will sell, acting independently on his own motion, it would seem

to follow logically that every seller should have the legal right to fix his prices by agreement with other men. The mere fact of combination, on the part of two or more individual sellers, by an agreement which goes no further than to fix the selling prices of their own products, a thing which any and all of them could lawfully have done as individuals with regard to their respective holdings, surely adds no unlawful element to what was, before, strictly legal, and is as surely no violation of the legal rights of any party outside of the agreement. It is true that the law will not enforce the agreement as between the parties to it. But the making of the agreement, or its performance, involves no violation of the rights of other parties. The sole legal consequence is, that the law will not enforce it against one of the contracting parties at the instance of the others.

In the case of labor, these points have been decided over and over again. As to both labor and capital, they were practically unquestioned until very recently, since the beginning of the alarm over "trusts." Utterly beyond question, on principle and authority, is the legal right of the sellers of labor, whom we term employees, to combine and agree on the price at which they will sell it. But buyers of labor, whom we term employers, have precisely the same rights with the sellers of labor, whom we term employees. So, too, the buyers and sellers of merchandise stand on exactly the same legal footing. The law should give to each absolute and complete freedom of contract, including absolute and complete freedom to contract with other sellers in an agreement to fix the selling price of their own property. In other words, absolute freedom of contractual combination, as to the selling price of their own property, is logically a property right of the owners and sellers of merchandise, precisely as it is of the owners and sellers of labor.

Let us look at the situation from another standpoint.

The right of the sellers of labor, of employees, to agree with other labor sellers as to their own selling prices, as has already been stated, is to-day beyond question. Practically, in every food product, the greater part of the price consists, in one form or another, of the price of labor. Take, by way of illustration, the cost of a barrel of flour. The cost of the original wheat, in the hands of

the farmer who raises it, is mainly the cost of labor. At its next stage, in the flour mill, there has been added the cost of cartage and milling, again the cost of labor. At the railroad station there has been added the cost of more labor. Finally, when it comes to the consumer, the increase in successive prices consists almost entirely in successive additions of the cost of labor. In fact, in the case of nearly every article of merchandise, food product or other, whether a necessary of life or a luxury, by far the greater part of its cost is the cost of labor.

In every such case each successive vendor has acquired, by purchase, the results and the rights of former laborers, and has added thereto the results and the rights of his own labor. Each successive owner has been a purchaser of the results of the labor of other men before he becomes a vendor. Concededly, at every successive stage of production the laborers have the right to agree in combination as to the price of their own labor. Can it be denied that the same right exists in favor of the so-called merchant or capitalist, who buys the product of labor, and who adds thereto his own labor and the use of his own capital? On what basis of reason, or justice, or common sense, can we draw any legal distinction between the rights of contractual combination, which belong to the sellers of labor, and the same right on the part of later sellers of the products of that labor, called merchants or capitalists? Legislatures and courts have been losing their heads. Our law knows, or should know, no distinction of persons. Capitalists and laborers have the same legal rights.

Still another position should be stated.

The distinction between the combination rights of employers and employees, of capitalists and laborers, not only has no justification in law, but it rests on no sound distinction in economic fact. Every man is both capitalist and laborer, just as every man is both buyer and seller. The poorest day laborer is, to some extent, a capitalist. He owns his clothing, his household furniture, such as they are, and his own skill, which gives his labor its selling value. On the other hand, every capitalist is a laborer, and is often the harder laborer of the two. It may be that he does little or no work with his hands, and works in a luxuriously ap-

pointed office. Nevertheless he is a laborer. His labor is given to the study of investments. His work is work of the brain, a harder and more exhausting work than the work of the body. Moreover, it is the capitalist who has the greater part of the worry. And it is an old saying as well as a true one, that more men are killed by worry than by work. In short, the difference between the capitalist, so-called, and the laborer, so called, is one, not of kind, but of degree and proportion. The capitalist owns capital in a larger proportion than the man whom we term a laborer. The laborer works with his hands, in a larger proportion than the man whom we term a capitalist. In reality, in every industrial enterprise, the capitalist and the laborer are partners. Neither one of them can work alone. Consequently, they work together. They share profits. But in this way; the laborer, in general, takes his profits in the form of wages; and he takes them as he goes along, day by day, with practically no risk of loss. The capitalist, on the other hand, in general, supplies all the money in advance, takes all the risks of loss, and waits for his profit till the enterprise is completed. His profits may be large, or small; or he may suffer heavy losses.

So it is, then, that every capitalist is a laborer; every laborer is a capitalist; and in every industrial enterprise they are really partners, making their division of profits in each case according to their contracts, as to which the law, and justice, give, or should give, to each the same absolute contractual freedom.

Let us add still another point. It is often said that the laborer is at the mercy of the capitalist, and is consequently the victim of capitalistic oppression. As a statement of the general situation, nothing could be further from the fact. No doubt, there are many instances of oppression of laborers by capitalists. But there are just as many cases of oppression of capitalists by laborers. Taking the situation as a whole, however, if either party is at a disadvantage, the power of the laborer, at least under modern conditions, is the greater, by reason of the great increase in modern times in the case and completeness of combination on the part of laborers. The laborer always has at his

command the machinery of the strike. The employer almost always finds it impossible—in practice—to replace any large number of strikers with other employees. The larger the amount of capital employed in any single industry, the more largely is the employer in the power of his employees. For his loss from an interruption of business is larger; it is more impossible for him to obtain and organize an entire new working force. In the case of a small employer, having only a small number of employees, it is a matter of comparative ease for him to get new men, and to train them to their work. But in the case of a large mill or railroad, or any of our immense modern establishments, with their large armies of employees, combination on the part of the employees is comparatively easy, while it becomes a practical impossibility for the employer to replace his large body of employees of workmen, foremen and superintendents, with a trained and organized force of new men.

The current idea, therefore, that the increase in the amount of capital invested in a single industry makes an increase only in the power of the employer over his employees, is a mistake. The greater increase in power lies on the other side. The larger the amount of capital involved in any single industry, the greater is the loss from any interruption in its use. The larger the operations, the more delicate and full of danger is the position of the capitalist employer. Here, too, we must take into account other facts, the increase in intelligence, at least in this country, with all classes of workmen, and the increase in the ability of the workmen to get other employment, and to get assistance in a strike from other laborers. The trades unions have made a change in these respects, which has not been duly estimated.

Is it not evident, from a consideration of these facts, that no good reason can be found for a discrimination as to legal rights against the capitalist, based on the economics of the situation?

Let us see what is the situation as a matter of legal authority.

It is necessary to state, at the outset, that it is an absolute impossibility to reconcile all the decisions of the courts

on the points here considered and stated. Nor is it possible, in a single paper in a review, to do more than state a series of positions, each of which is sustained by the highest authorities in the English and American courts. But opinions of judges in large number, especially within the last few years, can be cited in opposition to each one of these positions.

It should also be noted, that the legal positions here stated embody much more than mere declarations of courts as to what the law is. They are also the well-considered judgments of the greatest jurists in England and America, as to what the law ought to be, in order to ensure the fullest protection, in all his legal rights, to every citizen, high or low, rich or poor, capitalist or laborer. To quote the language of Chancellor Kent:

"A great proportion of the rules and maxims which constitute the immense code of the common law grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference. It was the application of the *dictates of natural justice and of cultivated reason to particular cases.* In the just language of Sir Matthew Hale, the common law of England is, 'not the product of the wisdom of some one man, or society of men, in any one age; but of the *wisdom, counsel, experience and observation of many ages of wise and observing men.*'"

Let us now state the legal propositions, which are established by the highest English and American authorities.

Those propositions are as follows:

I.—At common law, a mere combination to raise or maintain prices, of the property of the parties combining, constituted no violation of the rights of other individuals, or of that collection of individuals which we term the public.

This point must be considered as having been finally and conclusively settled both for English and American courts and legislatures by the case *Mogul Steamship Company* v. *McGregor*, Appeals Cases, 1892, p. 35. This case may possibly not be an authority in this country for all purposes. It certainly is a conclusive authority, for our courts as well as English courts, as to what was the English common law. And the case decided, that a mere combina-

tion to regulate the prices of the parties combining, although its object concededly was to drive others out of the trade and in the end destroy competition, constituted no violation of any legal right of others.

Seldom, if ever, has any case had such an exhaustive and able consideration. It was heard in the first instance on a motion for an injunction before Lord Coleridge, then went to the Court of Appeals, and thence to the House of Lords. There were ten opinions in favor of the proposition here laid down by the ablest jurists in England. There was only one dissenting opinion, by Lord Esher.

It must then be considered as conclusively decided, that a mere combination to raise or maintain prices of the property of the parties combining constituted no violation of the legal rights of any other person at common law.

No doubt such a combination will not be enforced by the courts. To that extent it may be said to be unlawful or void. But at common law the combination works no legal wrong, no legal injury to the rights of others than the parties combining.[1]

II.—The English statutes, which made such combinations criminal, did not form part of the law of our American colonies or of the States.[2]

III.—In this country neither legislatures nor courts have the lawful power to interfere with the absolute right of every owner of property, not employed in a "public occupation," to fix his own selling price with other private individuals, whether independently or in combination with other sellers. Especially, they have no legal power to make such fixing of price by combination with other sellers a crime.

It will be universally conceded, that the powers of legislatures or courts in declaring what may constitute a crime, are subject to some constitutional limitations.

If so, what are those limitations?

If there be any such limitations whatever, certainly one of them must be this, that no man can be lawfully deprived, directly or indirectly, of his absolute right to fix the sell-

[1] See, too, People *v.* Fisher, 14 Wendell, 19.

[2] Commonwealth *v.* Hunt, 4 Metcalf, 111; opinion by Chief Justice Shaw. Commonwealth *v.* Carlisle, Brightly, 36.

ing price of his own property, of his absolute *jus disponendi.*

As to the existence of the right to fix his own price by his separate individual action there can be no reasonable controversy. And it can make no difference, as a matter of law, whether the property be real or personal, whether it be land, merchandise, or labor. The rights of property, beyond the possibility of controversy, involve the right of possession, the right of use, and the right of sale, the *jus disponendi.* One is as essential as the other. One is as undoubted as the other. The control of the owner is absolute. In the words of Blackstone, it is "that sole and despotic dominion which one man claims and exercises over the external things of the world in *total exclusion of the right of any other individual* in the universe" (2 Blackstone Com., 2).

The law on this point is thus stated in *Wynehamer* v. *The People*, 13 N. Y., 378, 396: "Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Thus Blackstone says (1 *Com.*, 138): 'The third *absolute right* of every Englishman is that of property, which consists in the free use, enjoyment and *disposal* of all his acquisitions, *without any control or diminution*, save only by the laws of the land.' Chancellor Kent says (2 *Com.*, 320): 'The *exclusive right* of using and *transferring* property follows as a natural consequence from the perception and admission of the right itself.' And again (p. 326): 'The power of *alienation of property* is a necessary incident to the right, and was dictated by mutual convenience and mutual wants.' * * * * * These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale, and placed without the protection of law, it were well that the attempt should be made."[1]

And it was in that case held, that any attempt to interfere with that absolute exclusive right of sale was unconstitutional, and beyond the power of the legislature.

As stated before, if the needs of the State require the possession or use of any property of an individual, then the

[1] NOTE.—The italics are the writer's.

State can take that property under the right of eminent domain. Under the power of taxation, it may take a man's entire property. But no power whatever, that is, no lawful power, whether of the State or of an individual, can interfere with that absolute control in favor of other individuals. The raising or maintaining of prices, then, by a single individual violates no legal rights of other individuals or of the State.

IV.—The same is true in law as regards a combination of individuals.

The reason is that other individuals than the parties combining have no rights in the premises to be violated. They have no legal right to demand a sale of the property of the combining parties, at a reasonable price, or at any price.

But under our law there can be no crime, unless there is a violation of some legal right of some individual. In the language of Blackstone, "In all cases the *crime includes an injury*; every *public offense is also a private wrong*, and something more; it affects the individual, and it likewise affects the community" (4 Blackstone Com., 5). So, too, Serjeant Stephen in his "New Commentaries on the Laws of England" says: "*A crime is the violation of a right*, when considered with reference to the evil tendency of such violation, as regards the community at large. The distinction of public wrongs from private, that is to say, of crimes from civil injuries, seems upon examination to consist principally in this, that private wrongs (or civil injuries) are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals, while *public wrongs* (or crimes and misdemeanors) are a *violation of the same rights* considered with *reference to their effect on the community in its aggregate capacity*."

Until lately it has not been questioned that every crime must involve, in its very essence, the violation of some legal right of some individual.

Consequently, if no individual in the entire community has any legal right which is violated by a combination merely to raise the prices of the property of the parties combining, such a combination cannot constitute a crime.

This point was quite free from doubt until the advent

of this modern mania over "trusts," over these large combinations of capital. It had been decided, time and again, that combinations of laborers, merely to fix the prices of their own labor, constituted no violation of law, civil or criminal. Owners of merchandise have the same rights of full protection to their own property with the owners of labor. If all the courts in Christendom were to say the contrary, it is utterly unreasonable, and unlawful, to refuse to the owners of merchandise the same rights of property, and the same rights of combination, that are ensured to the owners of labor.

As to combinations of individuals, then, it is submitted that the law is well settled, so far as it rests on reason and on authority, notwithstanding some recent statutes and decisions of the courts.

V. The law as to combinations is the same with corporations as with individuals.

Corporations have the same right to fix the selling price of their own property as individuals, either separately, or in combination with others.

The reason why an individual must have the absolute power of fixing the selling price of his own property is that any other rule deprives him of one of the chief of his property rights; it deprives him of property "without due process of law."

The same rights, founded on the same reasons, exist in favor of corporations.

A corporation, so far as concerns the points here under consideration, is nothing but a combination of individuals, an artificial individual, and, as such, an owner of property. As such an owner of property, it has the same property rights, including the absolute *jus disponendi*, the right to sell or not to sell at its own free will, with the same right to fix its own selling price.

It is submitted, therefore, that corporations which are organized for the purpose of producing and buying property have precisely the same absolute and exclusive right to control the sale of that property that belongs to individuals. They have the same property rights, and those rights

are entitled to the same protection at the hands of the law.[1]

We are to bear in mind continually that, in cases of "public employments," carried on by either individuals or corporations, the State has the power to regulate prices. We are to bear in mind, also, the point that combinations for the purpose of interference with the industrial freedom of others, whether by corporations or individuals, involve violations of legal rights. But the mere refusal to sell below a certain price, or the refusal to sell at any price, whether by one individual or by a combination of individuals, or by one corporation or a combination of corporations, violates no legal rights of others. Of such combinations Lord Bowen said, in the *Mogul Steamship* case, and his statement of the law has been approved by all the ablest jurists in our own courts, until within a few years: "But what is the definition of an 'illegal combination?' It is an agreement by one or more to do an *unlawful act, or* to do an unlawful act by an *unlawful means.*" Later in his opinion he says: "It is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would in the present day be impossible—would be another method of attempting to set boundaries to the tides." Lord Fry said: "In all cases, therefore, a conspiracy is an agreement to do an unlawful act." In other words, it must be something more than a combination to regulate the prices of the property of the parties combining. To so regulate prices, in private employments, their right is absolute.

In conclusion, it is submitted, that the following additional propositions are correctly stated:

I. Corporate trusts are nothing but combinations of capital in the hands of corporations.

Consequently, they involve no new economic fact.

[1] Santa Clara County *v.* Southern Pacific Co., 118 U. S., 394, 396. Covington, &c., Co. *v.* Sandford, 164 U. S., 578, 592; Smyth *v.* Ames, 169 U. S., 466, 322, and many other cases).

II. Corporations have the same right to the absolute control of their own selling prices, of labor or merchandise, with individuals.

They have the same property rights.

Those rights are entitled to the same legal protection.

III. Corporate trusts, consequently, introduce no new legal problems, and the old principles and remedies of the law are adequate to the solution of all questions which may arise, either as to the legal rights of these "corporate trusts," or any legal wrongs which they may do to others.

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